

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

DENNIS WEISS, as assignee of
Independent Bank,

Plaintiff,

vs.

MICHAEL J. GREER,

Defendant/Third-Party
Plaintiff,

vs.

JMO PROPERTIES, INC.; D.K.WEISS
& ASSOCIATES, CERTIFIED PUBLIC
ACCOUNTANT, PLLC; and DENNIS
WEISS,

Third-Party Defendants.

Case No. 14-05293-CKB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

On December 31, 2015, the Court resolved competing motions for summary disposition in this dispute between two shareholders in a real-estate venture called JMO Properties, Inc. (“JMO”). In a nutshell, the Court awarded summary disposition to Plaintiff Dennis Weiss pursuant to MCR 2.116(C)(10) on the issue of liability on his claim for breach of guaranty against Defendant Michael Greer, but the Court left the matter of damages for resolution at trial. Also, the Court left unresolved Greer’s third-party claims for unjust enrichment and contribution. Now, after conducting a trial to the bench, the Court must resolve those outstanding issues, and thereby establish how much money Greer must pay Weiss for their real-estate investment gone bad.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” The Court must render “[b]rief, definite, and pertinent findings and conclusions on the contested matters” that may take the form of “a written opinion.” See MCR 2.517(A)(2) & (3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

The basic facts underlying this dispute are essentially uncontested.¹ In 2005, Plaintiff Weiss and Defendant Greer formed JMO for the purpose of buying, developing, and selling property. The two men became equal partners and shareholders in JMO, which borrowed \$296,000 from a bank based upon personal guaranties of Weiss and Greer and then used the loan proceeds to buy property on 15 Mile Road in Cedar Springs. The planned development, however, never came to fruition and the economic downturn in 2008 left JMO unable to satisfy its repayment obligations. In time, Weiss purchased JMO’s debt from the bank and then filed this action in an effort to hold Greer accountable for JMO’s loss. Thus, in his capacity as the plaintiff, Weiss stands in the bank’s shoes.

What could otherwise be a simple collection matter has become complicated for two reasons. First, Plaintiff Weiss asserts that he infused JMO with capital in order to keep the company alive, and now he wants compensation from Greer for those alleged infusions of cash. Second, during the course of JMO’s struggles, which involved several forbearance agreements, the bank requested and obtained a guaranty from Weiss’s business, Third-Party Defendant D.K. Weiss & Associates (“D.K.

¹ The Court’s Opinion and Order Resolving Competing Motions for Summary Disposition Under MCR 2.116(C)(10), which the Court issued on December 31, 2015, contains a comprehensive explanation of the underlying facts. The Court need not recount the history of this dispute again in its findings of fact because the Court has already awarded summary disposition to Plaintiff Weiss, so the issue of Defendant Greer’s liability is no longer before the Court.

Weiss”). Thus, Greer contends that D.K. Weiss must bear a proportionate share of the cost of JMO’s loss. In addition, Weiss sold the one valuable asset of the company – the parcel of real estate – and the parties cannot agree on the proper method to treat that sale. Thus, the Court must untangle their disputes based upon largely undisputed facts.

II. Conclusions of Law

The Court’s conclusions of law must begin with a recitation of the decisions already made on summary disposition. First, Plaintiff Weiss has already established that Defendant Greer is liable to Weiss on the personal guaranty that Greer gave to the bank, so Weiss clearly has a right to recover damages from Greer. Second, to the extent that Weiss provided infusions of capital to the parties’ business, Weiss has a viable argument that those infusions must be treated as loans that the parties’ company must repay. Third, Greer may attempt to obtain recovery from Weiss on a theory of unjust enrichment if, but only if, Weiss sold the real property belonging to JMO in a transaction that merely benefitted Weiss. Finally, Greer may be able to reduce his obligation to Weiss by demonstrating that he is entitled to contribution from Weiss for any debt he owes. The Court shall take up each of these four matters in turn.

A. Plaintiff Weiss’s Claim for Breach of Contract.

By all accounts, Defendant Greer provided at least two guaranties to the bank in connection with JMO’s effort to purchase real property and its subsequent attempt to keep itself afloat. See Trial Exhibits 4 & 13. Each guaranty backed the obligation of JMO on a series of promissory notes in the approximate amount of \$296,000. See id.; see also Trial Exhibits 5 & 12 (promissory notes). Thus, Greer expressly assumed an obligation to the bank of nearly \$300,000. But on December 23, 2013,

Weiss purchased the JMO loan from the bank, see Trial Exhibit 32, thereby stepping into the shoes of the bank and obtaining the bank's right to collect the \$285,942.05 balance due on the promissory note as well as costs and interest. See id. Weiss chose to seek recovery from Greer based upon the guaranties Greer had signed. Thus, Weiss – standing in the shoes of the bank – is entitled in the first instance to obtain the full amount that Greer owed to the bank on his guaranties.

The computation of Defendant Greer's obligation on the guaranties yields a total outstanding balance of \$321,869.02. See Trial Exhibit 38. That aggregate amount includes \$285,942.05 as the principal balance, see Trial Exhibit 32 (Loan Sale and Assignment Agreement, § 4), an additional fee of \$13,101.72, see id. (Loan Sale and Assignment Agreement, § 4(d)), and accrued and unpaid interest in the amount of \$22,825.25. See Trial Exhibit 38. Having reviewed all of the documents submitted by the two sides, the Court is satisfied – and therefore finds as a fact – that Greer must pay \$321,869.02 on his guaranties. That amount constitutes the damages that Weiss is entitled to recover from Greer on Weiss's breach-of-contract claim, which Weiss is entitled to pursue as assignee of the bank.

B. Plaintiff Weiss's Claim for Loan Reimbursement.

Throughout the proceedings, Plaintiff Weiss and Defendant Greer have freely mixed claims arising from their borrowing relationship with claims concerning the operations of JMO. Although the pleadings do not cleanly divide the parties' competing claims along those lines, the Court must keep in mind that Weiss can assert a claim for breach of contract in the bank's stead, and Weiss also can seek relief as a shareholder of JMO who furnished loans for the parties' business. Consequently, the Court must permit Weiss to seek compensation from JMO for the funds that Weiss supplied to

the company.² Although such infusions may be characterized as either capital contributions (which are generally not reimbursable) or loans (which are ordinarily reimbursable), the record indicates that at least some of Weiss's infusions should be treated as loans, rather than capital contributions. Greer provided no matching infusions, and JMO issued no capital calls. Instead, Weiss simply provided money to JMO to cover necessary expenses of the business. For example, on one occasion, Weiss issued and signed a demand note in the amount of \$20,821.69 to offset funds he supplied "to make required mortgage payments on property [JMO] owns in Cedar Springs, MI." See Trial Exhibit 9. In the Court's view, that infusion of cash along with the accompanying paperwork has the hallmarks of a business loan, so it should be characterized as a loan.³ See Roth Steel Tube Co v Commissioner of Internal Revenue, 800 F2d 625, 630 (6th Cir 1986).

But Plaintiff Weiss has gone much further, insisting that his QuickBooks print-out confirms that he loaned \$175,731.96 to JMO through a long series of payments for a variety of expenses. See Trial Exhibit 37. Moreover, Weiss has demanded interest of \$29,981.12 on top of the loan amount. See Trial Exhibit 39 (Amortization Schedule at 9). In the Court's view, this is a bridge too far. The

² The Court notes that no allegation in the complaint directly addresses Plaintiff Weiss's loan theory. Indeed, Weiss filed the complaint simply "as assignee of Independent Bank" and demanded "\$290,425.25, plus attorney's fees and costs as permitted by contract and law" in his prayer for relief. Nevertheless, the parties contested the matter of loans at trial, so the issue is ripe for decision.

³ "The determination of whether advances to a corporation are loans or capital contributions depends on whether the objective facts establish an intention to create an unconditional obligation to repay the advances." Roth Steel Tube Co v Commissioner of Internal Revenue, 800 F2d 625, 630 (6th Cir 1986). The United States Court of Appeals for the Sixth Circuit has identified eleven factors that can "be used in making the capital contribution versus loan determination[.]" Id. Several of the factors militate in favor of characterizing Plaintiff Weiss's infusion of \$20,821.69 as a loan, rather than a capital contribution. See id. For example, the obligation is supported by a demand note, see Trial Exhibit 9, which identifies the specific amount of the obligation and provides the fixed interest rate for repayment. See id.

record contains no documents memorializing or even reflecting any such loan from Weiss to JMO. To be sure, Weiss provided money to keep JMO above water after Defendant Greer abandoned ship, but the Court has scant evidence to support either the existence or the amount of the “loan” claimed by Weiss. Thus, the Court must reject Weiss’s contention that he loaned JMO nearly \$200,000, see Roth Steel Tube, 800 F2d at 630, and simply credit Weiss for a loan in the amount of the \$20,821.69 obligation that is well-documented in the record. See Trial Exhibit 9.

C. Defendant Greer’s Third-Party Claim for Unjust Enrichment.

When Plaintiff Weiss decided to purchase the JMO loan from the bank, Weiss also elected to sell JMO’s only meaningful asset, *i.e.*, a parcel of real property on 15 Mile Road in Cedar Springs, in order to raise money to defray the purchase price of the JMO loan. On October 1, 2014, with the blessing of the bank, Weiss caused JMO to sell the real property on a land contract for \$180,000, see Trial Exhibit 35, and Weiss also entered into an agreement with the bank ensuring that all payments on the land contract would be applied to reduce Weiss’s obligation to the bank arising from Weiss’s purchase of the JMO loan. Id. (September 28, 2014, letter signed by Weiss and Independent Bank). But because Weiss purchased the JMO loan with the intent to collect from Defendant Greer on his guaranty of the loan, application of land-contract payments to Weiss’s outstanding obligation for the purchase price of the JMO loan resulted in a benefit exclusively to Weiss in his capacity as the new owner of the JMO loan. In Count Six of his third-party complaint, Greer characterizes this as unjust enrichment under Michigan law. The Court agrees.

“Our Supreme Court ‘has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another.’” Morris Pumps v Centerline Piping, Inc., 273

Mich App 187, 193 (2006). To prevail on his claim of unjust enrichment, Third-Party Plaintiff Greer “must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” Id. Here, Greer has demonstrated that Third-Party Defendant Weiss sold JMO’s real property on a land contract and is now using the proceeds of the land contract to pay the purchase price of the JMO loan that Weiss bought from the bank. Because Greer and Weiss owned equal shares in JMO, Weiss’s sale of JMO’s real property on a land contract and his use of the land-contract proceeds to benefit himself amounts to a textbook example of unjust enrichment. The most efficacious remedy for the unjust enrichment in this case is the application of the land-contract proceeds to reduce the obligation of JMO, and thus Greer as its guarantor, on the bank loan to JMO that Weiss purchased. Consequently, the Court shall deduct the land-contract sale price, *i.e.*, \$180,000,⁴ see Trial Exhibit 35, from Greer’s obligation on his guaranty of the loan to JMO that Weiss bought.

D. Defendant Greer’s Third-Party Claim for Contribution.

As the Court explained in resolving the parties’ competing motions for summary disposition, Third-Party Plaintiff Greer has presented a viable claim for contribution in Count Seven of his third-party complaint. When an obligee seeks recovery from only one of the two obligors on a promissory note, that obligor may then demand contribution from the other obligor to square up the division of

⁴ The Court has chosen to use the sale price on the land contract of \$180,000, as opposed to the anticipated land-contract proceeds of \$180,000 plus interest of 4.5 percent per annum, because the sale price augmented by interest reflects the time value of money and the risk and administrative burden associated with the land-contract sale. Crediting the land-contract amount to Greer as unjust enrichment relieves him of having to wait for periodic payments under the land contract, which will not be paid off until 2019. See Trial Exhibit 36 (amortization schedule). Additionally, crediting the land-contract amount to Greer as unjust enrichment will save him the risk and administrative burden of having to enforce the land contract if payments are not made.

the obligation. See Evangelista v Evangelista, No 297575, slip op at 2-3 (Mich App June 9, 2011) (unpublished decision). Greer and Plaintiff Weiss both agreed to cover the \$296,000 JMO bank loan by signing guaranties, see Trial Exhibits 4, 8 & 13, so Greer is entitled to contribution from Weiss for one-half of the obligation on the JMO loan. Accordingly, the Court shall employ the concept of contribution to reduce Greer's obligation to Weiss – who stands in the bank's shoes in collecting on Greer's guaranty – from the full amount due on the JMO loan to merely one-half of that debt.

But Defendant Greer's contribution claim does not end with recovery from Plaintiff Weiss. Greer has decided to press his luck by contending that JMO itself and Weiss's company, D.K. Weiss, should also be allocated proportionate shares of the JMO obligation, leaving Greer responsible for only one-quarter of the JMO debt. The Court rejects that argument as to JMO and D.K. Weiss. With respect to JMO, it is a dry well from which no money can be recovered. Indeed, the only reason that the Court saddled Greer with the obligation on the JMO loan is that JMO cannot make its payments on that loan. The Court would not ask the bank to reduce its recovery from the guarantors to account for JMO's obligation on the loan, so the Court likewise cannot direct the bank's assignee, *i.e.*, Weiss, to accept a reduced recovery from Greer in his capacity as a guarantor by allocating a portion of the loan obligation to JMO under a theory of contribution.

The Court's analysis of Defendant Greer's contribution claim against Third-Party Defendant D.K. Weiss involves a bit more subtlety. Plaintiff Weiss owns and operates D.K. Weiss – which is an accounting firm – as his principal source of work and income. But when JMO became delinquent in its obligation on the loan and the bank lost patience with the guarantors, *i.e.*, Weiss and Greer, the bank demanded additional protection in exchange for additional forbearance. Greer had disappeared, leaving Weiss to manage JMO's obligations, so Weiss turned to the only available option – his own

business – in an effort to obtain additional forbearance. To be sure, D.K. Weiss signed forbearance and surrender agreements with the bank that “guarantee[d] to the Bank the full and prompt payment of both the Note and Weiss Note[.]” See Trial Exhibits 30 & 31. But unlike the original JMO loan that provided \$296,000 for business operations and enabled Weiss and Greer to buy a valuable parcel of property for their business, the eleventh-hour involvement of D.K. Weiss in obtaining additional forbearance resulted in no benefit to D.K. Weiss. Under the circumstances, allocating a share of the JMO obligation to D.K. Weiss based upon the theory of contribution makes no sense. “Contribution is an equitable remedy based on principles of natural justice[.]” Tkachik v Mandeville, 487 Mich 38, 47 (2010), which ordinarily requires that anyone ““who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.”” Id. But this approach ““is premised upon the simple proposition that equality is equity.”” Id. Here, from the inception of JMO’s operations, the benefits and burdens of that business were to be divided equally between Weiss and Greer, with no allowance for either man’s outside ventures. The Court ought not alter that governing approach simply because Weiss had to bring in D.K. Weiss to obtain additional forbearance. Accordingly, the Court concludes that Greer is entitled to contribution from Weiss, but not from D.K. Weiss.

III. Verdict

For the reasons stated in the Court’s findings of fact and conclusions of law, the Court hereby renders a verdict in favor of Plaintiff Weiss and against Defendant Greer based upon the following conclusions. First, Greer’s initial obligation as a guarantor of the JMO loan is \$321,869.02. Second,

Weiss is entitled to \$20,821.69 for repayment of a loan to JMO. Third, Greer's obligation must be reduced by \$180,000 to account for the proceeds of the land-contract sale of JMO's real property. Fourth, the resulting aggregate obligation of \$162,690.71 must be divided in half under the theory of contribution, yielding a judgment amount of \$81,345.35 that Greer must pay to Weiss.⁵ The Court invites Weiss to submit a proposed final judgment memorializing these verdicts under the so-called seven-day rule. See MCR 2.602(B)(3).

IT IS SO ORDERED.

Dated: October 18, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁵ The computation is as follows: $\$321,869.02 + \$20,821.69 - \$180,000 = \$162,690.71$. That number, divided by two, yields a final figure of \$81,345.35.